No. 182

In the Supreme Court of the United States

October Term, [illegible]

The United States of America ex rel. [illegible], appellant,

v.

Robert E. Tod, Commissioner of Immigration at the Port of New York.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA EX REL. Catoni Tisi, alias Lista Cortina, appellant,

v.

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION at the port of New York.

No. 132.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE RESPONDENT.

STATEMENT.

This case comes before the Court by direct appeal from an order of the District Court of the United States for the Southern District of New York, which dismissed a writ of habeas corpus and remanded the relator to the custody of the United States Commissioner of Immigration at the Port of New York for deportation under a warrant duly issued by the Secretary of Labor. The warrant had been issued under the authority of the Act of Congress of October 16, 1918, ch. 186, sections 1 and 2, 40 Stat. 1012, the first section of which was amended June 5, 1920, ch. 251, 41 Stat. 1008.

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Section 1 of this Act provides:

> That the following aliens shall be excluded from admission into the United States:
>
> * * * * *
>
> (*d*) Aliens who * * * knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) The overthrow by force or violence of the Government of the United States or of all forms of law, * * *.

Section 2 is as follows:

> That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this act irrespective of the time of their entry into the United States.

Section 19 of the Act of February 5, 1917, ch. 29, 39 Stat. 889–890, concludes with this provision:

> In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

Catoni Tisi, the relator and appellant, is an alien who was born in Sigillo, Province of Perugia, Italy, and came to the United States in 1904. (R. 1, 11.)

On April 25, 1921, at about 10.30 p. m., he and ten others were seated around a table at 2232 Moore Street, Philadelphia, Pennsylvania, engaged in folding circulars. (R. 15–24, 27–28.) One of these circulars is printed in the record at pages 25–26 and contains the following statements (R. 26):

> The United States Government stands for the bosses against the workers; it uses the law-making bodies, the courts, and its troops against the workers.
>
> Then we must destroy the United States Government.
>
> We must overthrow it and put *it* in its place a workers' government. We must uphold the workers' government with a strong army to crush the bosses and all who support them.
>
> We must prepare for the revolution; there is no other way.

While the appellant and his companions were thus engaged, six officers of the Philadelphia police force entered the room. For a minute or two the intrusion was not noticed by those seated at the table, who continued to fold circulars. (R. 15, 23.) The officers then arrested the entire group, took them to the Central Police Station, where they were given a hearing the following day and held under $5,000 bail for trial in the State courts. (R. 28.)

On April 30, 1921, three of the police officers made affidavits, which are printed on pages 27–28 of the record, and which contained inter alia the following statement:

> We then entered the dining room on the first floor and found twelve (12) men seated around the table holding a meeting. The table was covered about one foot deep with seditious literature. (R. 28.)

These affidavits were attached to an application to the Secretary of Labor for a warrant of arrest. (R. 9.) The warrant was issued July 28 (R. 2, 5, 10), and the alien was given a hearing before an Immigration Inspector on August 8, 1921. (R. 11.) At the hearing four of the police officers who assisted in making the arrests, and the appellant himself, testified. Each of the officers stated clearly and positively that when they entered the room there were large bundles of circulars lying upon the table and that the appellant with the other men was seated at the table actively engaged in folding the circulars to a convenient size for distribution. (R. 15–24.) Some of the circulars were printed in the English and some in the Italian language. The former, which were introduced in evidence, were of the character proscribed by the Act of Congress. The character of the latter does not appear from the record.

The appellant testified that he had gone to 2232 Moore Street about 9.30 p. m. for the purpose of collecting a debt from Baldassare, one of the men

there gathered. When he entered they gave him a drink of wine, and he remained and chatted with them. He was not sure whether he sat down at any time during the hour that he remained in the house but was sure that he was standing up ready to go when the officers came in. He admitted that there were a lot of circulars piled up on the table, but said that he did not know what they were, for he could not read English, and paid little attention to them. (R. 11–14.)

The record of the hearing was forwarded to the Secretary of Labor, who found as a fact that Catoni Tisi "knowingly had in his possession for the purpose of circulation, distribution, publication, or display, written or printed matter, advising, advocating, or teaching the overthrow by force or violence of the Government of the United States." On September 23, 1921, the Secretary issued his warrant of deportation. (R. 29–30.) At the request of the appellant and his counsel, the case was several times reviewed by the Secretary of Labor, but on June 10, 1922, further reconsideration was refused and thereupon a petition for writ of habeas corpus was filed. (R. 6–7.) After a hearing before the District Court an order was made on August 1, 1922, dismissing the writ, from which order this appeal has been taken. (R. 31.)

It is urged by the appellant that the order of deportation deprives him of liberty without due process of law, in violation of the Fifth Amendment to the

Constitution of the United States, because there was no evidence before the Secretary of Labor upon which such order might be based.

ARGUMENT.

The findings of the Secretary of Labor and the order of deportation made thereon were based upon evidence contained in the record before him. They can not be reversed or set aside by the courts.

Congress has committed to the Secretary of Labor and the tribunals established by the regulations of his Department, power to hear and determine all questions relating to the admission of immigrants and the deportation of undesirable aliens. The jurisdiction of these tribunals, within their province, is exclusive and final. No appeal therefrom lies to the courts. In such cases the courts upon habeas corpus have undertaken to examine the proceedings upon which an order of deportation is based only for the purpose of determining whether a fair hearing was afforded or whether the immigration officers acted arbitrarily or abused the discretion vested in them. "Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all." (*Chin Yow* v. *United States*, 208 U. S. 8, 11.) "Whether in a given case the evidence warrants an order of deportation is a matter as to which the responsibility rests entirely with the Immigration tribunals. Their findings in that respect can not be reviewed or set aside by

Courts of Law, unless so entirely unsupported by evidence as to be not merely wrong but unreasonable, and to constitute an abuse of discretion and a denial of due process of law." (*Ex parte Petkos*, 212 Fed. 275, 276–277.)

Low Wah Suey v. *Backus*, 225 U. S. 460.
Zakonaite v. *Wolf*, 226 U. S. 272.
Lewis v. *Frick*, 233 U. S. 291.

In the instant case it is conceded that the evidence was sufficient to sustain a finding that the appellant had in his possession, for the purpose of distribution, printed matter which advocated the overthrow by force or violence of the Government of the United States, but it is said that there is no evidence that he had it in his possession *knowingly*.

In examining the record it must be remembered that, in the very nature of things, such evidence will not be direct, excepting in rare cases where the alien has confessed knowledge. Knowledge, like intent, is a mental state, and in most cases must be proved by circumstantial evidence.

In criminal cases, to which we naturally turn for authority, it is well settled that the jury in arriving at its verdict is not confined to a consideration of the palpable facts in evidence, but may draw all reasonable inferences therefrom.

United States v. *Wilson*, 176 Fed. 806, 810.
United States v. *Greene*, 220 Fed. 973.

Where the knowledge with which an act is done constitutes an element of a criminal offense, the

prosecution is required to show only the defendant's ability and opportunity to know.

> *Rivers* v. *State*, 118 Ga. 42, 44 S. E. 859.
> *Wuertemberg* v. *State* (Texas Cr. App.), 51 S. W. 944.

Knowledge may be inferred from circumstances, such as an apparently intentional neglect to make inquiry before engaging in a doubtful transaction. In *Bonker* v. *People*, 37 Mich. 4, 9, Mr. Chief Justice Cooley said:

> No doubt where guilty knowledge is an ingredient in the offense, the knowledge must be found; but actual, positive knowledge is not usually required. In many cases to require this would be to nullify the penal laws.

In the case at bar the evidence shows that the appellant, for a period of about an hour, was in a room with a number of other men with whom he was conversing on terms of familiarity. At the end of that time he was found with the others seated at a table engaged in folding seditious literature. He thus had an opportunity by inquiring to learn the character of the literature and the purposes of the men engaged in handling it. These facts are sufficient to sustain the inference that he knew its character and the purpose for which it was intended.

It is true that he testified that he could not read English and did not know what the circulars were. But the Secretary of Labor was not bound to believe this testimony. In fact, he would have been justi-

fied in rejecting it entirely as unworthy of belief. The appellant had testified that when the officers entered the house he was standing up ready to go. This was flatly contradicted by all four of the officers. If they be believed, the testimony of the appellant was false upon this point and it would not be unfair to reject his testimony on other material matters. Furthermore, it is inherently improbable that this appellant would join a group of men of this kind about a table piled full of printed matter and engage in preparing it for distribution without inquiring and obtaining knowledge of its character.

The case is quite different from that of *United States ex rel. Kasparian* v. *Hughes*, 278 Fed. 262, which is relied upon by counsel for the appellant. In that case it appeared that the alien, who could not read the language in which certain seditious circulars were written, was employed and paid $3 for distributing them. Before engaging in the employment he inquired as to their character and was told that they were grocery advertisements. (Page 263.) The record before us presents no such case.

If the testimony of the appellant be true and that of the police officers be false, this is an unfortunate case; but, there being evidence of facts from which the inference of knowledge naturally and logically follows, the courts are without jurisdiction to discharge him on habeas corpus.

CONCLUSION.

It is respectfully submitted that the order of the District Court should be affirmed.

JAMES M. BECK,
Solicitor General.
GEORGE ROSS HULL,
Special Assistant to the Attorney General.

OCTOBER, 1923.

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